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In the Supreme Court of the United States

OCTOBER TERM, 1976

FORD MOTOR COMPANY
AND J. WALTER THOMPSON COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The initial opinion and order of the court of appeals (Pet. App. 1a-19a), and the order of the court of appeals on rehearing (Pet. App. 20a-24a) are not reported . The amended opinion of the court of appeals (Pet. App. 24a-38a) is reported at 547 F. 2d 954. The consent cease-and-desist orders of the Federal Trade Commission are reported at 84 F.T.C. 729 and 736. The Commission's denial of petitioners' requests to nullify the consent orders (Pet. App. 32a) is not reported.

JURISDICTION

The initial judgment of the court of appeals was entered on June 21, 1976 (Pet. App. 1a). The judgment on rehearing

was entered on December 10, 1976 (Pet. App. 20a). The petition for a writ of certiorari was filed on March 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission correctly interpreted and applied its rules governing consent procedures to preclude a party whose proposed consent agreement has been accepted by the Commission from unilaterally withdrawing from that agreement.

2. Whether the Commission adequately explained its denial of petitioners' request that it voluntarily withdraw its acceptance of their consent agreements.

STATUTES AND RULES INVOLVED

Section 3(a)(2) of the Administrative Procedure Act, 5 U.S.C. 552(a)(2), provides in relevant part:

> Each agency • • • shall make available for public inspection and copying—
>
> (B) those statements of policy and interpretations which have been adopted by the agency • • •;
>
> (C) • • • A final order, opinion, statement of policy, interpretation, or staff manual or instruction • • • may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

Section 6(e) of the Administrative Procedure Act, 5 U.S.C. 555(e) provides:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

The relevant provisions of the Federal Trade Commission's Rules of Practice are printed at Pet. App. 53a-56a.

STATEMENT

1. This case arises out of Federal Trade Commission enforcement activities against unfair or deceptive advertising by motor vehicle manufacturers and their advertising agencies. On December 11, 1972, the Commission issued a complaint against General Motors Corporation ("GM") and its advertising agency concerning advertisements for Vega and Opel automobiles. The proposed order accompanying the complaint indicated that, if the alleged unfair advertising violations were found to have occurred, GM would be ordered to cease and desist from making false claims regarding the Vega's (or any other GM automobile's) handling, steering, cornering, acceleration, braking, or ride quality characteristics, or regarding the Opel's need for lubrication.[1]

While that proceeding was pending, the Commission informed petitioners—the Ford Motor Company and its advertising agency, the J. Walter Thompson Company—that it proposed to issue a complaint against them concerning advertisements for certain Ford models. The

[1] See pages A-3 through A-12 of the Addendum to petitioners' brief in the court of appeals.

proposed order accompanying that complaint indicated that, if the charges were proved, petitioners would be ordered to cease and desist from making further false claims "concerning the structural strength, safety, or performance" of the Ford automobiles in question.[2] Pursuant to the Commission's then existing rules (Pet. App. 53a), the Commission offered petitioners the opportunity to negotiate a settlement before the Commission issued the complaint.

These two proceedings were pending when the Commission issued complaints against GM (concerning Cadillacs), Ford, and Chrysler Corporation in respect of advertisements by those companies making fuel economy claims for various automobiles.

2. In early 1974, petitioners entered into proposed consent order agreements with the Commission's staff in the "structural strength, safety, or performance" claims proceeding. The agreements, which were substantially identical to the orders that the Commission had proposed to enter against petitioners had a complaint been issued and the charges proved, contained no provision (such as a "most favored nation" clause) tying the relief therein to the results in any other Commission proceeding. In accordance with the Commission's rules (Pet. App. 53a54a), each agreement provided that upon acceptance by the Commission it would be placed on the public record for a specified comment period after which the Commission might withdraw its acceptance if "comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate" (Rule 2.33; Pet. App. 54a).

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[2]See pages 1 through 8 of the Joint Appendix (hereinafter "J.A.") in the court of appeals.

The Commission accepted the petitioners' settlement proposals and set them out for public comment. During the comment period, petitioner Ford informed the Commission that it wished to withdraw its consent and requested the Commission to withdraw its acceptance of the order. Ford asserted that it had an unqualified right to withdraw its consent at any time during the comment period, and that it was exercising that claimed right because it had learned that GM and the Commission's staff had agreed to a proposed settlement in the Vega/Opel proceeding that contained relief less restrictive in some respects than that to which Ford had agreed.[3] Ford said that it had not anticipated that there would be such differences between its order and the GM Vega/Opel order, and that the differences would have an adverse competitive effect on Ford. See J.A. 28-30, 34-35, 37, 39.[4] Petitioner Thompson Company also sought to withdraw its consent, but gave no reasons for doing so (J.A. 38).

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[3]The Ford agreement (reflecting the order accompanying the proposed complaint) forbade false claims concerning the "performance" of the Ford automobiles, whereas the proposed GM agreement (reflecting the order that had accompanied the complaint in that proceeding) applied only to specific handling characteristics.

On the other hand, the GM Vega/Opel agreement applied to all GM automobiles, whereas Ford's applied only to Ford Division automobiles.

[4]Ford also complained of a consent order that in the meantime had been accepted by the Commission in the GM Cadillac case. That order applies to both fuel economy and performance claims for any GM automobile. Ford took the position that "[e]ven insofar as the General Motors order contains a provision dealing with performance claims, it is far narrower than the broad prohibition in the Ford order" (J.A. 35).

The fuel economy cases against Ford and Chrysler are still being litigated. See *Ford Motor Co.*, 87 F.T.C. 756; *Chrysler Corp.*, 87 F.T.C. 719, appeal pending, C.A. D.C., No. 76-1586.

On October 8, 1974, the Commission issued an order against GM in the Cadillac case and, on the next day, issued the present orders against petitioners (J.A. 51-60, 61-70). Prior to serving the orders, the Commission advised petitioners that its rules precluded them from withdrawing their consent to the agreements once the Commission had accepted them, and that it would not be in the public interest for the Commission to withdraw its acceptance of those agreements (Pet. App. 32a; J.A. 48-49, 50).[5]

3. Petitioners sought review in the court of appeals. On June 21, 1976, the court ruled that the Commission's interpretation of its rules as prohibiting petitioners from unilaterally withdrawing from the consent agreements "is consistent with the language of the rule[s] [and] does not offend due process" (Pet. App. 6a). The court also held, however, with one judge dissenting, that the Commission, in dismissing petitioners' request that it rescind its acceptance of the agreements, had abused its discretion in not holding a hearing and making findings of fact regarding petitioner Ford's claim of competitive disadvantage. The court stated (*id.* at 15a) that its holding created an exception "to the general rule of finality of FTC consent orders" that applied when a party alleged that an unforeseeable "major change of circumstance" had occurred after the Commission had accepted a consent agreement but before it had been published as a final order, and when the party's objection to being bound in light of those changed circumstances was based on a *prima facie* showing "of unfair and serious economic disadvantage capable of threatening the competitive position of the [party] in the industry concerned." The court remanded the case to the Commission with

[5]Shortly thereafter the Commission accepted the consent order in the GM Vega/Opel case and, after the public comment period, issued that order against GM (85 F.T.C. 27; see Pet. App. 36a).

instructions to hold a hearing and make findings on petitioners' claims.[6]

The Commission thereupon filed a petition for rehearing in which, *inter alia*, it expressly called the court's attention to the consent order in the GM Cadillac fuel economy case, which restrained GM in advertising with respect to fuel economy or "the performance" of its automobiles (Pet. App. 37a-38a).[7] The court granted the Commission's petition, amended its earlier opinion, and entered judgment for the Commission (Pet. App. 20a-24a). Although the court did not expressly so state, its affirmance of the Commission's order apparently was based on the court's view that, in light of the GM Cadillac order (as well as the GM Vega/Opel order), there was insufficient substance to petitioners' claims to require the Commission to elaborate further on its reasons for rejecting petitioners' request that the Commission rescind its acceptance of their consent agreements.

ARGUMENT

The judgment of the court of appeals is correct. The Commission's interpretation of its own rules is supported by the language and purpose of those rules and it was not unfair

[6]Judge McCree, dissenting, would have held that petitioners had not made out a claim entitling them to any relief and that the Commission's orders should therefore have been upheld.

[7]In post-decision memoranda to the court of appeals, both sides agreed that neither had previously mentioned the GM Cadillac order because it had not been considered relevant to the principal issue posed by petitioners, *viz.*, whether petitioners had an unqualified right unilaterally to withdraw from the consent agreements regardless of any perceived difference in orders in competitors' cases. The court's statement (Pet. App. 13a) in its initial opinion that the alleged competitive disadvantage to Ford would apply "to the currently important area of gasoline economy" prompted the Commission to bring the GM Cadillac order to the court's attention.

for the Commission to apply its rules, so construed, to petitioners. The Commission's explanation of its refusal to rescind its acceptance of the consent agreements was adequate under the Administrative Procedure Act and *a fortiori* the court of appeals did not substitute its judgment for the agency's in holding that further explanation was not required. The decision below does not conflict with any decision of this Court or of any other court of appeals, and does not raise any issue of importance warranting review by this Court.

1. Petitioners contend (Pet. 11-15) that the Commission's rules of practice should be construed to entitle a private party unilaterally to withdraw from a consent agreement at any time during the public comment period (or during the subsequent period in which the Commission is authorized to withdraw its acceptance of an agreement).[8] The Commission has construed its rules as denying private parties that right (Pet. App. 32a). The Commission's interpretation of its own rules is "of controlling weight unless it is plainly erroneous or inconsistent with" the rules themselves. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414. Accord, *Northern Indiana Public Service Co.* v. *Izaak Walton League*, 423 U.S. 12, 15; *Ehlert* v. *United States*, 402 U.S. 99, 105; see also *Udall* v. *Tallman*, 380 U.S. 1, 16-17; *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408.

[8]In their first question presented (Pet. 2-3), petitioners frame the issue in terms of a private party's right to withdraw in light of unexpected perceived differences in a competitor's order. Both before the Commission and in the court of appeals, however, petitioners asserted an unqualified right unilaterally to withdraw without regard to competitors' orders; indeed, petitioners stated to the court of appeals that their argument concerning the Commission's rules posed only "a pure question of law as to which particular circumstances were not pertinent" (Response by Petitioners to the Court's Order of September 14, 1976, p. 8). Any question regarding a private party's right to withdraw its consent because of alleged differences in a competitor's order is therefore not properly before this Court.

Petitioner's position is that a "binding settlement had [not] been reached" when they sought to withdraw from the consent agreement during the public comment period (Pet. 12). They acknowledge that as a general rule of law an offeror may not withdraw his offer once it has been accepted (*ibid.*), but they assert that under the Commission's rules this point cannot be reached until the comment period has come to an end and the Commission has issued the consent order in final form.

The Commission's contrary conclusion, however, better reflects the language of the rules themselves. Rule 2.34 provides that upon receiving a proposed agreement the Commission may "(1) [a]ccept it; (2) reject it and issue its complaint * * *; or (3) take such other action as it may deem appropriate" (Pet. App. 54a). The rule further provides that "[i]f an agreement is accepted," the Commission shall place the proposed order on the public record for the prescribed comment period, and that "[t]hereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement * * * or issue and serve its complaint * * *" (*id.* at 54a-55a). Rule 2.33 provides that "[e]very agreement shall contain * * * provisions * * * that the agreement shall not become a part of the official record of the proceedings unless and until it is accepted by the Commission; and that the Commission may withdraw its acceptance" if comments submitted during the public comment period indicate to the Commission "that the order contained in the agreement is inappropriate, improper, or inadequate" (*id.* at 53a-54a).

In short, the consent procedure rules on their face provide that the comment period follows, rather than precedes, acceptance by the Commission of a settlement offer. Moreover, the Commission's conclusion that petitioners were bound once their agreements had been accepted not only reflects the language of the rules but also is justified by important practical considerations, as the Seventh Circuit recognized in *Johnson Products Company* v. *Federal Trade Commission*, 549 F. 2d 35 (Pet. App. 39a-52a), in agreeing with the court below that the Commission's interpretation "is consistent with the language of the rule[s], does not offend due process, and should be accepted by" a reviewing court (549 F. 2d at 40).[9]

2. Petitioners suggest (Pet. 14) that they have been treated unfairly because at the time they submitted the consent agreements to the Commission they "had no reason to anticipate that the Commission would come forth * * * with a novel interpretation of its Rules drastically modifying the general rule that an offer is not binding until final

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[9]Even were the Commission's rules ambiguous with respect to when acceptance of a proposed consent agreement takes place—and we think they are not—the Commission's construction "sensibly conforms to the purpose and wording of the [rules]" and the courts are therefore " 'obligated to regard [that construction] as controlling * * *.' " *Northern Indiana Public Service Co.* v. *Izaak Walton League*, *supra*, 423 U.S. at 15 (and cases cited therein).

The provisions of Rule 2.34 giving the Commission a limited right unilaterally to withdraw its acceptance of a proposed agreement do not detract from the reasonableness of the Commission's interpretation of its rules as not conferring a comparable right upon private parties. Those provisions are designed, as the court of appeals explained (Pet. App. 6a), to allow the Commission "in the public interest to escape from the consequences of the provisional consent if public comment provides objections which were not previously considered." Accord, *Johnson Products Company* v. *Federal Trade Commission*, *supra*, 549 F. 2d at 37-39.

acceptance." They also assert (*ibid.*) that the Commission's interpretation and application of its rules in this case violated Section 3 of the Administrative Procedure Act, 5 U.S.C. 552.

As we have shown, however, the Commission's construction of its rules did not "drastically modify" general principles of offer and acceptance, but instead sensibly interpreted those rules in accordance with their language. Nor did the Commission violate 5 U.S.C. 552, for that provision does not apply here. Section 552 requires that agencies "make available for public inspection and copying * * * those statements of policy and interpretations which have been adopted by the agency" and that a "statement of policy, interpretation, or staff manual or instruction * * * may be relied on, used, or cited as precedent by an agency against a party * * * only if * * * the party has actual and timely notice of the terms thereof." In this case the Commission did not rely on an interpretation already "adopted by the agency," but instead construed, for the first time, a published rule. Nothing in the Administrative Procedure Act requires that the first interpretation by an agency of one of its duly promulgated rules must be applied only prospectively. See *National Labor Relations Board* v. *Bell Aerospace Company*, 416 U.S. 267, 291-294.[10]

Nor can petitioners predicate unfairness on the difference between their orders and GM's. Even assuming that those

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[10]Moreover, since the Commission has now construed its rules governing consent procedures to preclude private parties from unilaterally withdrawing their consent to agreements already accepted by the Commission and set out for public comment, petitioners' claim that the rules were ambiguous cannot recur and therefore presents no issue of general importance warranting review by this Court.

differences were not foreseeable,[11] petitioners could have insisted that their proposed agreements contain "most favored nation" clauses linking the relief contemplated to developments in other cases involving petitioners' competitors. Indeed, Ford itself has previously used such a clause to its advantage. See *Ford Motor Co.* v. *United States,* 335 U.S. 303, 308-312; see also *Winn-Dixie Stores, Inc.* v. *Federal Trade Commission,* 377 F. Supp. 773 (M.D. Fla.). If petitioners had proposed such provisions and the Commission had declined to settle the case on that basis, petitioners could have insisted upon their right to go to trial. But petitioners' failure to bargain as hard as they might have did not compel the Commission, as a matter of fairness, to release petitioners from an agreement negotiated at arm's length that the Commission had already accepted.

3. Petitioners challenge the sufficiency of the Commission's explanation of its denial of their requests that it withdraw its acceptance of their consent agreements (Pet. 15-16). In the circumstances of this case, however, the Commission's explanation—that it would not be in the public interest for it to nullify the agreements (Pet. App. 32a)— satisfied the Administrative Procedure Act. In cases not involving agency adjudication, the Act requires only a "brief statement of the grounds" of an agency's denial of

[11]The inclusion of the restrictions on claims regarding "performance" in the consent orders to which petitioners agreed reflected the relief that the Commission had proposed to enter had the charges against them been litigated and proved (see page 4, *infra*). By contrast, the order accompanying the complaint against GM in the Vega/Opel case contained no reference to performance claims, but referred instead to specific handling characteristics (*ibid.*). When petitioners entered into consent agreements reflecting the order the Commission had initially proposed to enter against them, they had no reason to believe that any order entered in the Vega/Opel case (which was still being litigated) would be broader than the Commission had initially proposed to enter in that case.

relief. 5 U.S.C. 555(e). Assuming *arguendo* that the Commission's explanation is subject to judicial review,[12] the proper standard is not the "substantial evidence" test, "which is appropriate when reviewing findings made on a hearing record, 5 U.S.C. §706(2)(E)"; rather, it is whether the Commission's action was " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. §706(2)(A)" (*Camp* v. *Pitts,* 411 U.S. 138, 141-142). The Commission's explanation "may have been curt" (*id.* at 143), but it satisfied Section 555(e) and was not an abuse of discretion.[13] As Judge McCree said,

[12]We do not concede that review is available here. First, petitioners agreed to forego review when they entered into consent orders that, in accordance with the Commission's rules, included "express waivers" by petitioners "of all rights to seek judicial review or otherwise to challenge or contest the validity of the order[s]" (Pet. App. 53a). See *Martin Marietta Corporation* v. *Federal Trade Commission,* 376 F. 2d 430, 433-434 (C.A. 7), certiorari denied, 389 U.S. 923. Second, the Commission's actions concerning consent orders are "committed to agency discretion" under Section 10(a)(2) of the Administrative Procedure Act, 5 U.S.C. 701(a)(2), and its refusal to withdraw its acceptance of the consent orders in this case is unreviewable for that reason as well. See *Action on Safety and Health* v. *Federal Trade Commission,* 498 F. 2d 757, 761-763 (C.A. D.C.); cf. *Kennecott Copper Corporation* v. *Federal Trade Commission,* 542 F. 2d 801, 804 (C.A. 10); *Bristol-Myers Company* v. *Federal Trade Commission,* 469 F. 2d 1116, 1119-1120 (C.A. 2); *Martin Marietta Corporation* v. *Federal Trade Commission, supra,* 376 F. 2d at 432-433.

[13]*Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, and *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, relied on by petitioners (Pet. 9), are inapposite. Those cases involved formal, on-the-record adjudication of issues as to which the agency was required to make specific findings of fact and conclusions of law. As the court of appeals recognized (Pet. App. 26a), consent order proceedings, by contrast, are designed to obviate the need for formal litigation and are not conducted on the record. An agency is accordingly not obliged to explain the basis for its actions in such proceedings with the same detail that is necessary in formal agency adjudications.

dissenting from the court of appeals' initial decision in this case (Pet. App. 18a):

> The FTC did not arbitrarily ignore petitioners' representations. It determined, although without a formal hearing, that the withdrawal of its consent would not be in the public interest. And it is difficult to understand how it is contrary to the public interest merely to forbid the petitioners to advertise the performance of a product unfairly and deceptively by presenting evidence that is not "competent" or "reliable" to prove the claims made, or to make any statements or representations about performance without a reasonable basis for these statements.

Finally, since the Commission's statement that it would not be in the public interest to withdraw its acceptance of the agreements satisfied all requirements of the Administrative Procedure Act, it follows that, contrary to petitioners' claim (Pet. 16-18), the court below did not improperly rehabilitate an insufficient explanation in affirming the Commission's issuance of the consent orders, or substitute its judgment for the agency's in a matter committed in the first instance to the agency's determination.[14]

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[14]Petitioners contend (Pet. 17) that the Commission's mention on rehearing of the GM Cadillac consent order (which includes a restriction on claims regarding "performance," as do the orders entered against petitioners) amounted to "an imaginative 'after-afterthought' " of Commission counsel that the court of appeals was not entitled to consider under the rule of *Securities and Exchange Commission* v. *Chenery Corporation, supra.* In *Chenery*, however, the agency had expressly based its decision on a rationale that the Court held to be erroneous as a matter of law. The Court then rejected alternative grounds offered by agency counsel in support of the decision because the record was bare of any indication that the agency had in fact considered or relied upon such grounds. That is not the case here. Even assuming that the initial decision of the court below correctly established a limited exception to the finality of Commission consent orders (but see Judge McCree's dissent (Pet. App. 15a-18a)), it cannot be said that the Commission had not considered the effect of the GM Cadillac order in rejecting petitioners' request that it withdraw its acceptance of their consent agreements. The GM order was issued contemporaneously with the orders against petitioners, and petitioners had expressly called that order to the Commission's attention (J.A. 35) in letters that the Commission said it had considered (Pet. App. 32a). Thus it was proper for the court of appeals to conclude on rehearing that the Commission had taken the GM order into account and that its determination that it would not be in the public interest to withdraw its acceptance of petitioners' agreements was based on an adequate appraisal of petitioners' contentions regarding competitive disadvantage. Unlike the situation in *Chenery*, the GM Cadillac order was not raised as an "alternative" ground for the agency's decision, but as a factor—initially overlooked by the court of appeals—that the Commission had considered in determining where the public interest lay.

4. *Johnson Products Company* v. *Federal Trade Commission, supra,* does not conflict with this case. There the respondent had sought not only to withdraw from its consent agreement after the Commission had accepted it, but also (unlike petitioners) to persuade the Commission to enter a more stringent order than the one proposed against one of its competitors (Revlon). Having made changes in the Revlon order in response to comments by the respondent and others, the Commission then invited the respondent to move to modify its consent order so that the Commission could determine whether modification of that order would be appropriate—an action the Commission could not take while the matter was pending before the court of appeals. See 15 U.S.C. 45(c). In those circumstances the court remanded the case to the Commission without deciding whether the respondent "was entitled to a hearing with findings on its claim that * * * it should have been allowed to withdraw from the consent order agreement" (Pet. App. 52a). Since the issue decided below was not passed upon in *Johnson*, there is no conflict between the two cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1977.

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*The Solicitor General is disqualified in this case.

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